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Supreme Court, U.S.
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No. 08-

IN THE

Supreme Court of the United States

WILLIAM M. RIGBY, JR., PRIVATE FIRST CLASS,
UNITED STATES ARMY,
Petitioner,

v.

UNITED STATES OF AMERICA,
Respondent.

On Petition for Writ of Certiorari To the United States Court of Appeals for the Armed Forces

PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED

Whether the Court of Appeals for the Armed Forces misconstrued Article 125, Uniform Code of Military Justice, 10 U.S.C. § 925, and relevant *Manual for Courts-Martial* provisions when it held that the defense of mistake of fact does not apply to the age element of sodomy with a child?

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IN THE

Supreme Court of the United States

WILLIAM M. RIGBY, JR., PRIVATE FIRST CLASS,
United States Army, Petitioner,

v.

THE UNITED STATES OF AMERICA, Respondent

On Petition for a Writ of Certiorari To the United States Court of Appeals for the Armed Forces

PETITION FOR WRIT OF CERTIORARI

The petitioner, William M. Rigby, Jr., respectfully prays that a writ of certiorari issue to review the decision of the United States Court of Appeals for the Armed Forces in this case.

OPINIONS BELOW

The order of the United States Court of Appeals for the Armed Forces is unreported (Appendix A). The *per curium* decision of the United States Army Court of Criminal Appeals is unreported (Appendix B).

JURISDICTION

The judgment for the Court of Appeals for the Armed Forces was entered on March 19, 2008. The jurisdiction of this Court is invoked pursuant to 28 U.S.C. § 1259(3), the United States Court of Appeals for the Armed Forces having reviewed this case pursuant to Uniform Code of Military Justice Article 67(a)(3); 10 U.S.C. § 867(a)(3).

STATUTE INVOLVED

Article 125, UCMJ, 10 U.S.C. § 925 provides:

> § 925. Art. 125. Sodomy
> (a) Any person subject to this chapter who engages in unnatural carnal copulation with another person of the same or opposite sex or with an animal is guilty of sodomy. Penetration, however slight, is sufficient to complete the offense.
> (b) Any person found guilty of sodomy shall be punished as a court-martial may direct.

RULE FOR COURTS-MARTIAL INVOLVED

Rule for Courts-Martial (R.C.M.) 916(j)(1) provides:

> (j) *Ignorance or mistake of fact.*
> (1) *Generally.* Except as otherwise provided in this subsection, it is a defense to an offense that the accused held, as a result

of ignorance or mistake, an incorrect belief of the true circumstances such that, if the circumstances were as the accused believed them, the accused would not be guilty of the offense. If the ignorance or mistake goes to an element requiring premeditation, specific intent, willfulness, or knowledge of a particular fact, the ignorance or mistake need only have existed in the mind of the accused. If the ignorance or mistake goes to any other element requiring only general intent or knowledge, the ignorance or mistake must have existed in the mind of the accused and must have been reasonable under all the circumstances. However, if the accused's knowledge or intent is immaterial as to an element, then ignorance or mistake is not a defense.

MANUAL FOR COURTS-MARTIAL PROVISION INVOLVED

Manual for Courts-Martial, United States (*MCM*), pt. IV, para. 51 (2002 ed.), in relevant part, provides:

b. *Elements.*

(1) That the accused engaged in unnatural carnal copulation with a certain other person or with an animal.

(Note: Add either or both of the following elements if applicable)

(2) That the act was done with a child under the age of 16.

(3) That the act was done by force and without the consent of the other person.

. . .

d. *Lesser included offenses.*

(1) *With a child under the age of 16.*

. . .

(b) Article 134—indecent acts with a child under 16

. . .

e. *Maximum punishment.*

(1) *By force and without consent.* Dishonorable discharge, forfeiture of all pay and allowances, confinement for life without the eligibility for parole.

(2) *With a child who, at the time of the offense, has attained the age of 12 but is under the age of 16 years.* Dishonorable discharge, forfeiture of all pay and allowances, and confinement for 20 years.

(3) *With a child under the age of 12 years at the time of the offense.* Dishonorable discharge, forfeiture of all pay allowances, and confinement for life without the eligibility for parole.

(4) *Other cases.* Dishonorable discharge, forfeiture of all pay and allowances, and confinement for 5 years.

. . . .

STATEMENT

Procedural History

Before an enlisted panel sitting as a general court-martial, petitioner was convicted, contrary to his pleas, of carnal knowledge, sodomy with a child under the age of sixteen years, and adultery in violation of Articles 120, 125, and 134 of the Uniform Code of Military Justice (UCMJ), 10 U.S.C. §§ 920, 925, and 934 (2002). The panel sentenced petitioner to confinement for six years, reduction to the grade of Private (E-1), forfeiture of all pay and allowances, and a dishonorable discharge.

During an Article 39(a) session with counsel, the military judge stated his refusal to give the panel the mistake of fact instruction regarding the sodomy offense, stating that "this defense of course does not apply to sodomy and I will so instruct." The military judge instructed the panel that, "It is the fact of the child's age, and not the accused's knowledge or belief, that fixes criminal responsibility."

The convening authority reduced the length of confinement to four years and otherwise approved the adjudged sentence. The convening authority also credited appellant with sixty days of confinement against his sentence, deferred the reduction in grade and forfeitures until action, and thereafter waived automatic forfeitures for six months.

On September 27, 2007, the Army Court of Criminal Appeals affirmed the findings of guilty and the sentence. On January 18, 2008, the Court of Appeals for the Armed Forces (CAAF) granted review of the following issue:

> WHETHER THE MILITARY JUDGE ERRED WHEN HE FAILED TO GIVE THE REQUESTED MISTAKE OF FACT AS TO AGE INSTRUCTION FOR THE OFFENSE OF SODOMY WITH A CHILD UNDER THE AGE OF SIXTEEN.

The CAAF rendered its opinion on March 19, 2008, affirming the decision of the Army Court of Criminal Appeals. The CAAF held that, in view of *United States v. Wilson*, 66 M.J. 39 (C.A.A.F. 2008), the military judge did not err when he failed to give the requested mistake of fact as to age instruction for the offense of sodomy with a child under the age of sixteen.

REASONS FOR GRANTING THE PETITION

The United States has seen a disturbing increase in the number of sex offenses involving children and the military has not been immune from this trend. To combat this insidious problem, the military employs a number of federal statutes criminalizing sexual contact with children. However, to avoid punishing Soldiers with no vicious intent, the military allows accused Soldiers to raise a mistake of fact as to age defense to certain sex crimes with

children where the accused reasonably and honestly believed the individual was at least sixteen years old. In this case, the lower court, applying its decision in *United States v. Wilson*, 66 M.J. 39 (C.A.A.F. 2008)[1] decided that the mistake of fact defense does not apply to sodomy with a child, despite its similar nature and structure to other military sex offenses where the defense does apply. This Court must settle this important federal question in the military because the lower court misapplied the common law rule presuming mens rea for the elements of a crime and created a rule that will yield inconsistent results amongst similarly situated offenses and offenders.

SUMMARY OF ARGUMENT

The defense of mistake of fact as to age applies to sodomy with a child under the age of sixteen because the age of the child is a general intent element of the offense. Normally, every element of an offense has a mental component. Absent an affirmative indication that Congress or the President intended to dispense with mens rea, there is a presumption against strict liability in criminal offenses. Nothing indicates the President intended sodomy with a child to serve as a strict liability offense. As neither intent nor specific knowledge is mentioned in the text of the statute or the Presidential provisions in the *Manual for Courts-*

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[1] A Petition for Writ of Certiorari for *United States v. Wilson* was filed with this Court on May 21, 2008 and docketed on May 22, 2008.

Martial, the applicable mens rea of the age element is general intent. An honest and reasonable mistake of fact constitutes a defense to a general intent element; therefore, the defense of mistake of fact as to age is available to an accused charged with sodomy with a child under the age of sixteen.

ARGUMENT

Congress has criminalized common law sodomy in the military through Article 125, UCMJ, which provides:

> (a) Any person subject to this chapter who engages in unnatural carnal copulation with another person of the same or opposite sex or with an animal is guilty of sodomy. Penetration, however slight, is sufficient to complete the offense.
> (b) Any person found guilty of sodomy shall be punished as a court-martial may direct.

As its plain text shows, Article 125, UCMJ, criminalizes sodomy without regard to the age of the victim.

However, the President, through executive order, created a distinct category of sodomy involving a child. *MCM*, pt. IV, para. 51b (2002 ed.). At the time of Appellant's offense, Paragraph 51b, entitled "Elements," provided,

> (1) That the accused engaged in unnatural carnal copulation with a certain other person or with an animal.
> (Note: Add either or both of the following *elements* if applicable)
> (2) *That the act was done with a child under the age of 16.*
> (3) That the act was done by force and without the consent of the other person.

Id. (emphasis added).[2] The President promulgated these additional elements under his authority to prescribe punishments for offenses. *See* Article 56, UCMJ, 10 U.S.C. § 856 ("The punishment which a court-martial may direct for an offense may not exceed such limits as the President may prescribe for that offense."). These age and consent elements serve as aggravating factors, or sentence enhancers, that increase the maximum punishment. Sodomy

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[2] These were the elements of sodomy in effect at the time of Appellant's offenses. The President has since amended Paragraph 51b to provide for two distinct categories of sodomy involving a child. The elements now include the following:

> (1) That the accused engaged in unnatural carnal copulation with a certain other person or with an animal.
> (Note: Add any of the following as applicable)
> (2) That the act was done with a child under the age of 12.
> (3) That the act was done with a child who had attained the age of 12 but was under the age of 16.
> (4) That the act was done by force and without the consent of the other person.

MCM, pt. IV, para. 51b (2005 ed.).

with a child who has attained the age of twelve, but not sixteen permits confinement for twenty years. *MCM*, pt. IV, para. 51e (2002 ed.). Sodomy with a child under twelve permits confinement for life without the eligibility for parole, as does forcible sodomy. *Id.*

Rule for Courts-Martial 916(j)(1), which encapsulates the defense of mistake of fact as it exists in military law, divides elements into three categories, depending on the mens rea required: (1) specific intent elements, which require "premeditation, specific intent, willfulness, or knowledge of a particular fact;" (2) general intent elements, which require "only general intent or knowledge;" and (3) strict liability elements, where "knowledge or intent is immaterial." To constitute a defense to a specific intent element, a mistake of fact need only be honest, while a mistake as to a general intent element must be both honest and reasonable. R.C.M. 916(j)(1). Because strict liability elements do not contain a mens rea component, a mistaken belief as to facts constituting those elements is not a defense. *Id.*

The question of whether knowledge or intent is material to an element is an issue of statutory construction. *Staples v. United States,* 511 U.S. 600, 604 (1994). A fundamental principle regarding this issue is that strict liability offenses, requiring no mens rea for at least one element, have a "generally disfavored status." *Liparota v. United States*, 471 U.S. 419, 426 (1985). The common-law rule, which has also been applied to statutory offenses, requires

some mens rea for a crime. *Staples*, 511 U.S. at 605-06. "Silence . . . by itself does not necessarily suggest that Congress intended to dispense with a conventional mens rea element, which would require that the defendant know the facts that make his conduct illegal." *Id.* at 605; *see United States v. Langley*, 33 M.J. 278, 281 (C.M.A. 1991) (stating that since no specific intent is mentioned in Article 120, UCMJ, general intent applies). This Court has suggested that there must be some indication of congressional intent to create a strict liability crime. *Staples*, 511 U.S. at 606.

Here, the essential question is whether the President intended to dispense with a conventional mens rea element when he created the aggravated sodomy offense of sodomy with a child. Though the element itself is silent on this issue, nothing affirmatively indicates the President intended sodomy with a child to be a strict liability offense with no requirement that an accused know that he is engaging in sexual activity with a child. Thus, as *Staples* instructs, the age element must be interpreted as containing a traditional mens rea component. Because the element does not mention intent or specific knowledge, the applicable mens rea is general intent, to which an honest and reasonable mistake of fact defense applies.

The fact that the age element itself does not mention a mental component does not mean that knowledge or intent is immaterial. Indeed, the lower court has applied the mistake of fact defense to many general intent crimes in the military where

there is no affirmative indication that the element at issue requires knowledge or intent. *See, e.g., United States v. Hibbard*, 58 M.J. 71, 72 (C.A.A.F. 2003) (applying mistake of fact to rape); *United States v. Brown*, 22 M.J. 448, 451 (C.M.A. 1986) (applying mistake of fact to violation of a general regulation); *United States v. Timmins*, 45 C.M.R. 249 (C.M.A. 1972) (applying mistake of fact to AWOL). Moreover, when the President or Congress intends to dispense with mens rea and impose strict liability, they say so explicitly. In Part IV of the *MCM*, the President's explanation of the offense of improper use of a countersign explicitly addresses the relevance of an accused's knowledge of the essential facts. *MCM*, pt. IV, para. 25c(4) (2002 ed.) (stating that "the accused's intent or motive in disclosing the countersign or parole is immaterial to the issue of guilt, as is the fact that the disclosure was negligent or inadvertent" and that "it is no defense that the accused did not know that the person to whom the countersign or parole was given was not entitled to receive it"). In Article 120, UCMJ, Congress has defined when mistake of fact constitutes a defense to carnal knowledge and has specifically excepted cases where the victim is under the age of twelve. The discussion section to R.C.M. 916(j) also notes these two offenses as "[e]xamples of offenses in which the accused's intent or knowledge is immaterial" and the defense of mistake of fact does not apply.

In the second part of its statutory and regulatory analysis in *United States v. Wilson*, the lower court notes that Congress's amending Article 120, UCMJ,

in 1996 to include a mistake of fact defense for carnal knowledge cases, followed in the same year by the President's implementing the change in the *MCM*, militates against finding that Congress and the President ever intended to have the same defense apply to sodomy with a child. 66 M.J. 39, 45 (C.A.A.F. 2008). When one considers the state of the *MCM* before those changes, however, it becomes apparent that Congress's and the President's actions in 1996 stand for the proposition that mistake of fact has applied to sodomy with a child all along.

For the offense of carnal knowledge, the 1995 *MCM* provides, "It is no defense that the accused is ignorant or misinformed as to the true age of the female . . .; it is the fact of the girl's age and not his knowledge or belief which fixes his criminal responsibility." *MCM*, pt. IV, para. 45c(2) (1995 ed.). For the offense of sodomy with a child, the 1995 *MCM* provides no similar language. *Id.* at para. 51c. As the lower court recognized in its opinion, this Court has consistently held that "'[W]here Congress includes particular language in one section of a statute but omits it in another section . . . it is generally presumed that Congress acts intentionally and purposely in the disparate . . . exclusion.'"[3] *Russello v. United States*, 464 U.S. 16, 23 (1983) (citation omitted). It follows that when the President used strict liability language to

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[3] The lower court uses the rules of statutory interpretation to construe the *MCM*. *United States v. Custis*, 65 M.J. 366, 370 (C.A.A.F. 2007).

describe carnal knowledge but did not use such language to describe sodomy with a child, then the latter is not a strict liability offense. Moreover, the use of such language suggests that, pre-1996, carnal knowledge was an offense for purposes of R.C.M. 916(j) where "knowledge or intent is immaterial" while the absence of such language to describe sodomy with a child suggests that offense falls within the general mistake of defense for general intent crimes provided in R.C.M. 916(j).

Surprisingly, the lower court's statutory and regulatory analysis in *Wilson* runs counter to the conclusion the same court reached just two years prior when it decided the same issue in a case involving a similar sexual offense. In *United States v. Zachary*, 63 M.J. 438 (C.A.A.F. 2006), the lower court held that an honest and reasonable mistake of fact defense is available to an accused charged with committing indecent acts with a child under the age of sixteen. *Id.* at 439. Recognizing the incongruity that would result if mistake of fact did not apply to all similarly criminalized sexual activity with children, the court indicated that mistake of fact also applies to sodomy with a child.[4] *Id.* at 442.

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[4] Citing the 1996 change to Article 120(b), UCMJ, which recognized a mistake of fact defense for carnal knowledge, the lower court noted, "The practical effect of this amendment is that mistake of fact as to age is now a clearly delineated defense for the crimes of sodomy and carnal knowledge." *Zachary*, 63 M.J. at 442. Perhaps one reason for this language is the lower court's longstanding recognition that rape and sodomy are treated the same in many respects. *See United States v. Goodman*, 33 C.M.R. 195, 198 (C.M.A. 1963) ("It has been said that sodomy and rape are 'kindred crimes' and that

Moreover, the court noted indecent acts with a child is a lesser included offense of sodomy with a child, implying that it would not be permissible for the mistake of fact defense to apply to the lesser offense but not the greater where both offenses share the same element. *Id.* at 442 n.27.

The lower court's shunning of *Zachary* in *Wilson* is particularly perplexing given the similar structure of the offense at issue in that case to the offense at issue in this case. *Compare MCM,* pt. IV, para. 87 (2002 ed.), *with id.* at para. 51. In both offenses, age is an element. In both offenses, the *MCM*, not the statutes involved, sets forth the age element. In *Zachary*, the lower court held that the general mistake of fact defense in R.C.M. 916(j)(1) applies to the age element of indecent acts with a child. Yet, here, as in *Wilson*, the lower court, faced with a similar offense involving sexual contact with children, held that the same defense does not apply. The lower court's analysis in *Zachary* offered persuasive guidance to the lower court on this issue, yet it failed to even address the merits of that case, much less distinguish it.

As a result, sodomy with a child represents an outlier in the scheme of sex crimes in the military. Rather than engage in judicial interpretation of a substantive issue of criminal law, the lower court abdicated its interpretive role to Congress or the

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the principles of law governing the one also govern the other.'") (citations omitted); *United States v. Morgan*, 24 C.M.R. 151, 153 (C.M.A. 1957) (recognizing the same).

President, lamenting that the issue involved a public policy decision. In so doing, the court created a rule that results in disparate treatment of similar sex crimes, several of which are often implicated in the same course of conduct. Under the lower court's ruling, a Soldier who engages in sexual intercourse, inappropriate touching, and oral sodomy in the same course of conduct with a child under sixteen, yet one who he honestly and reasonably believed to be over sixteen, will have a viable defense to the first two offenses, but not the third. Disparity will result amongst various offenders as well—for instance, when one Soldier engages in sexual intercourse and another Soldier engages in oral sodomy with underage individuals, the former has a potential mistake of fact defense, while the latter does not. Because a proper statutory and regulatory analysis does not dictate these incongruent results, this Court should exercise its discretion and grant the petition.

CONCLUSION

WHEREFORE, petitioner respectfully requests that this Court grant his petition.

Respectfully submitted,

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APPENDIX A

IN THE CASE OF
UNITED STATES, Appellee

V.

William M. RIGBY, Jr.
Private First Class
U.S. Army, Appellant

No. 08-0029/AR
Crim. App. No. 20050708

UNITED STATES COURT OF APPEALS FOR THE ARMED FORCES

ORDER

On further consideration of the granted issue, 66 M.J. ___ (C.A.A.F. January 18, 2008), and in view of United States v. Wilson, 66 M.J. 39 (C.A.A.F. 2008), it is, by the Court, this 19th day of March 2008,

ORDERED:

That the decision of the United States Army Court of Criminal Appeals is affirmed.

For the Court.

/s/ William A. DeCicco
Clerk of the Court

APPENDIX B

IN THE CASE OF
UNITED STATES, Appellee

V.

William M. RIGBY, Jr.
Private First Class
U.S. Army, Appellant

ARMY 20050708

UNITED STATES ARMY
COURT OF CRIMINAL APPEALS

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27 September 2007

DECISION

Per Curiam:

On consideration of the entire record, including consideration of the issues personally specified by the appellant, we hold the findings of guilty and the sentence as approved by the convening authority correct in law and fact. Accordingly, those findings of guilty and the sentence are AFFIRMED.*

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* Assuming without deciding that the military judge erred in failing to instruct the panel on the defense of mistake of fact as to age in regard to the offense of sodomy with a child under the age of sixteen, we find any such error to be harmless beyond a

FOR THE COURT:
s/ Malcolm H. Squires Jr.
MALCOLM H. SQUIRES, JR.
Clerk of Court

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reasonable doubt. The panel was properly instructed on this defense in regard to the carnal knowledge offense arising during the same course of sexual activity. The panel found appellant guilty of carnal knowledge. "If the panel found the mistake-of-fact-as-to-age defense did not apply with respect to the carnal knowledge offense, then *a fortiori*, it would have also found it did not apply with respect to the [sodomy] with a child offense." *United States v. Acosta-Zapata*, 2007 CCA LEXIS 71 at * (Army Ct. Crim. App. 8 Mar. 2007). *See also United States v. Sanchez*, ARMY 20050399 (Army Ct. Crim. App. 3 May 2007) (unpub.).